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ABSTRACT

Protecting an idea is often a difficult process. Some ideas and inventions cannot be protected, while others are eligible for only narrow or partial immunity from potential competition and imitation. Obtaining even minimal protection can often be expensive, time consuming, and ultimately result in uncertain or even negative benefits to the inventor. This report was prepared to familiarize the inventor, creator, or developer of a new idea with the basic legal framework that is available to protect the idea and the products that result from it. More importantly, it is designed to help the inventor decide which, if any, type of protection is available for a particular idea, and whether such protection is worth obtaining. Each of the four types of intellectual property protection--i.e., patent, copyright, trademark, and trade secret--is discussed in a separate section. The issues addressed include requirements for patentability, components of patent applications, information about examination of the patent by patent officers, practical considerations, enforcement of patent rights, trademark infringement, and fair use. The final section provides answers to 24 commonly asked questions about intellectual property protection. (SD)

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A Guide To INTELLECTUAL PROPERTY PROTECTION

Third Edition August 1988

A Collaborative Effort
Minnesota Small Business Assistance Office
Merchant, Gould, Smith, Edell, Welter & Schmidt, P.A.

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PREFACE

Innovation, invention and the process of translating ideas into products and services has been, and remains, a major factor in Minnesota's economic growth. Indeed in today's world that process has even greater importance in light of concerns about national productivity and international competitiveness.

This guide is intended to serve as a primer for the inventor and entrepreneur on the protection of new ideas and the products which result from them. Like all publications of this kind, the guide is not intended as a substitute for the advice of an attorney on the complexities of intellectual property law. Hopefully it will help frame issues and concerns for discussion with private legal counsel as well as with investors, bankers, potential developers and customers.

Preparation of this work has been a collaborative effort between the Minnesota Small Business Assistance Office and the law firm of Merchant, Gould, Smith, Edell, Welter & Schmidt, P.A. A particular note of thanks must go to: David George Johnson, Michael L. Mau, Michael S. Sherrill, and Janice L. Umbel at Merchant, Gould, Smith, Edell, Welter & Schmidt, P.A.; R. Lawrence Buckley at the Toro Company and to Madeline Harris at the Minnesota Small Business Assistance Office.

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INTRODUCTION

This booklet has been prepared to familiarize the inventor, creator or developer of a new idea with the basic legal framework that is available to protect that idea. More importantly, this booklet is designed to help the inventor decide which, if any, type of protection is available for a particular idea, and whether such protection is worth obtaining.

Protecting a new idea is often a difficult process. Some ideas and inventions simply cannot be protected, while others are eligible for only narrow or partial immunity from potential competition and imitation. Obtaining even minimal protection can often be expensive, time-consuming, and ultimately result in uncertain or even negative benefits to the inventor.

The decision to seek protection for a new idea should be approached with the same caution and skepticism you would bring to any other commercial transaction, such as taking out a loan or starting a new business. Just because a new idea may be eligible for some form of legal protection does not mean that the cost of obtaining and preserving such protection is justified from a business viewpoint.

Although the final decision on protecting your idea can best be made by consulting a qualified attorney, you will be able to better select and communicate with an attorney if you already have some knowledge of the various types of intellectual property protection that are available. Even if you have yet to develop a new invention or concept, a general knowledge of intellectual property law can be helpful in avoiding the many problems that could easily jeopardize your idea in its early stages of development. Finally, many myths and misconceptions exist concerning the nature and value of patents, copyrights, trademarks and trade secret protection.

Many publications are already available that contain detailed information on how to obtain specific types of intellectual property protection. This booklet is not intended as an instruction manual for obtaining such protection, but is rather intended to assist the

new inventor or product developer in deciding if and when such protection may be beneficial.

Intellectual property protection is just one part of the successful marketing equation, and its true importance varies greatly according to each specific product or idea. No one can predict with certainty if the cost of obtaining intellectual property protection is justified in a particular case, but hopefully this booklet will permit you to be more alert to the opportunities and pitfalls encountered by those seeking to legally protect and commercially exploit a new idea.

David George Johnson
Merchant, Gould, Smith, Edell, Welter & Schmidt, P.A.

BASIC TYPES OF INTELLECTUAL PROPERTY PROTECTION

There are four basic types of intellectual property protection: patent, copyright, trademark and trade secret. Each will be discussed, beginning with patents.

PATENT PROTECTION

The patent system was created to help achieve various socially desirable goals. By providing an inventor with an exclusive right to make, use or sell an invention for a limited period of time, it serves to reward an inventor for the time and effort expended in developing the invention and thereby encourage further creative efforts. Since most new inventions have uncertain commercial value, the patent system provides a degree of protection from competition for a limited period of time, thus encouraging investment in new technology. The patent system encourages inventors to make their inventions known rather than to maintain them in a state of secrecy. This increases the amount of technological knowledge available to the public. Finally, the patent system helps to aid in the sale or transfer of technology both within the United States and in foreign countries, by giving a commercially tangible form to intangible ideas.

REQUIREMENTS FOR PATENTABILITY

There are several major hurdles an inventor has to overcome before patent protection can be obtained. First, the applicant must be able to demonstrate that he has developed a new, useful and not obvious process or product. A patent cannot be obtained unless the invention is new. This means that the invention must not have been known or used by others in the United States or patented or described in a publication in the United States or any foreign country before the invention was made by the applicant. In addition, if the invention was patented or described in a publication anywhere in the world or in public use or sale in the United States for more than one year prior to the date of filing the application, the patent will be denied. The invention must also be capable of some beneficial use. It should not be "frivolous, fraudulent, injurious to morals, health or good order." The invention must also not be obvious. Obviousness is the most common reason for Patent Office rejection. It may well be that the invention is something that has never before existed; however, if the Patent Office determines that a mythical person having access to all the information available to the public concerning that particular field of technology would have "known" how to make the invention, then the invention is rejected as being obvious.

A simplified example of an obviousness rejection is as follows:

> Suppose a person invents a coffee cup having a square rather than a rounded handle. It may be that such a product has never before existed. However, if the Patent Office finds that a square handle has been used previously on some other device, such as a suitcase, it may well determine that putting a square handle on a coffee cup would have been obvious to an imaginary person who is knowledgable about all publicly available information.

The invention must fit into one of the categories of patentable subject matter. Thus, the invention must be new, useful and nonobvious, and be either a:

- Process;
- Machine;

- Manufactured article;
- Composition; or
- An improvement of any of the above.

The term "process" means a process, art, or method. It also includes a new use of a known process, machine, manufactured article, composition of matter or material. A process may also be defined as one or more steps or acts performed on materials to produce a result. An example of a process would be the use of DDT to kill insects. Other examples of processes would be processes for treating malaria, processes for curing baldness and even processes for pressing pants. The term "machine" includes mechanical devices or combinations which perform some function and produce a certain effect or result. Examples of machines include carburetors, vacuum cleaners and lawn mowers. A "manufactured article" refers basically to any product or thing made by industry or man. Examples of manufactured articles are carpets, toothbrushes and purses. A "composition" is matter formed by the mixture of two or more ingredients. Examples of compositions are drugs, insecticides, adhesives and electroplating solutions. An "improvement" is an addition, simplification, or variation relating to an existing machine, process, manufactured article or composition of matter.

The type of patent described thus far is known as a utility patent, which is granted for an unrenewable term of 17 years. A second type of patent is known as a design patent. Design patents are available for anyone who invents any new, original and ornamental design for an article of manufacture. The key phrase here is "ornamental." In other words, design patents cover only the specific appearance of the article, rather than the concept of the article itself. Patents for designs are granted for a term of 14 years. Examples of articles for which design patents have been obtained are lamps, vases, and furniture.

PATENT APPLICATION COMPONENTS

A patent application can only be filed with the Patent Office by the actual inventor or his representative. The basic elements of a patent application are as follows:

- A specification, including a claim or claims;
- An oath or declaration;
- Drawings, when necessary;
- A filing fee; and
- An information disclosure statement.

A specification is a written description of the invention or discovery. It must clearly and concisely describe the manner and process of making and using the invention. It must be specific enough to enable a person who is knowledgable in the particular area to which the invention relates to make and use the invention. In addition, the specification must describe the invention in such a way as to distinguish it from other previously known inventions.

The specification must conclude with a claim or claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention or discovery. The claims legally define the patentable features of the invention. Each claim is a single sentence describing precisely what new, useful and nonobvious features constitute the actual invention. The claims are the most important part of an application since the monopoly granted by a patent covers only the material appearing in the claims. An example of a claim for a type of billiard table having a novel cushion is as follows:

> A playing table comprising a playing surface and a raised marginal edge portion surrounding said surface, said raised marginal edge portion having a longitudinally extending recess therein, and a cushion consisting only of a base disposed in said recess and a downwardly arcuately extending cantilevered lip integral with said base and extending away from substantially the top of said base.

The applicant is required to furnish a drawing of his invention when necessary for the understanding of the invention. This basically means that if it is possible to draw the invention, a drawing must be included. As many drawings as are necessary to fully describe the invention are required.

An oath must be signed and filed with the application stating that the named inventor is believed to be the original inventor of the invention which is claimed. The oath must also acknowledge the applicant's duty to disclose any information known to or later discovered by the inventor which is relevant to the examination of the application by the Patent Office.

The Patent Office requires the submission of an Information Disclosure Statement by the applicant. An Information Disclosure Statement contains a listing of patent publications and other information of which the applicant is aware and which he believes to be relevant to the examination of his application. An applicant must submit this document in order to comply with his duty of candor and good faith toward the Patent Office. Failure to do so could later enable another party to invalidate the issued patent.

EXAMINATION OF THE PATENT APPLICATION BY THE PATENT OFFICE

An application filed in the Patent and Trademark Office is assigned for examination to a group of patent Examiners having responsibility for the category of inventions to which the application relates. Theoretically, the Examiner makes a thorough study of the application and all of the available public information pertaining to the subject matter of the claimed invention.

It is the Examiner's job to determine whether the invention is patentable as claimed. The Examiner determines whether the invention is new, nonobvious, and useful. In addition, the Examiner determines whether the application has complied with certain formalities and various other statutory requirements.

After the initial examination is completed, the applicant is notified of the Examiner's decision. The Examiner may allow claims, reject claims, object to formal matters or any combination thereof.

If an Examiner allows a claim, it means that he believes the claim is patentable and that a patent should be issued incorporating that claim. If the invention is not considered patentable, or not considered patentable as claimed, the claims will be rejected. The Examiner will give reasons and cite references to explain his decision. Most claims are usually rejected as being obvious.

Examiners sometimes issue objections. An objection is a refusal to allow a claim because its form is improper or because some other part of the application is defective. An objection, as opposed to a rejection, is usually easily overcome.

As stated earlier, the Examiner will inform the applicant of the reasons for any adverse action taken on the application. He will also provide the applicant with any information or references on which his decision is based. If the Examiner's action is adverse in any respect, and the applicant wishes to persist in his application for a patent, he must reply to the Examiner's comments and request reconsideration. The applicant must specifically point out the supposed errors in the Examiner's action and respond to every ground of objection and rejection. The applicant may choose instead to amend his application and state how his amendments avoid the references or objections raised by the Examiner. After a response is filed by the applicant, the application will be reconsidered. The applicant will then be notified of the Examiner's decision in the same manner as was done after the first examination. On the second or any later examination or reconsideration, the rejection or other action may be made "final." The applicant's response is then limited to an appeal to the Patent Office Board of Appeals (in the case of the rejection of any claim) or a petition filed with the Commissioner of the Patent and Trademark Office (in the case of objections or requirements not involving the rejection of any claim).

THE EXAMINER'S INCENTIVES

The Patent Office evaluates its patent Examiners primarily according to the number of applications they process. Examiners, therefore, have no incentive to spend very much time on any one application. It is to their benefit to process applications as quickly as possible.

The Examiner typically does not take the time to read and study an application at length. An Examiner usually does a quick search to discover all of the relevant patents and other public information pertaining to the claims in an application. The Examiner then sends the applicant a letter (Office Action) rejecting the claims as being obvious in view of the material he has discovered during his search. The applicant must then respond by carefully explaining

and distinguishing each cited reference, thereby demonstrating to the Examiner that a patent should be issued. This saves the Examiner time since the applicant has spent his own time figuring out why the references cited by the Examiner are not particularly relevant, instead of the Examiner taking the time to do the same thing. Thus, claims that are originally rejected by an Examiner are frequently later allowed after the Examiner has had the opportunity to read the applicant's response distinguishing his invention from the cited references.

THE EXAMINER'S EXPERTISE

Patent Examiners all possess some type of technical training. Each Examiner has a particular category of inventions assigned to him. Some categories are very narrow. One Examiner, for example, may only handle applications based on the manufacture of electronic circuit boards. Such an Examiner will thus acquire a great deal of expertise on the subject of such circuit boards.

However, some Examiners are assigned a broad category of inventions to examine. This is simply due to the fact that the inventions can only be divided up into so many categories. Hence, it is very likely that such an Examiner will be dealing at times with inventions that he is not very familiar with. Thus, part of the application process may necessarily include educating the Examiner as to the particular problems or advantages addressed by the invention to which the application relates.

OPTIONS AVAILABLE AFTER RECEIVING A FINAL REJECTION

Continuing Application

A continuing application is basically an original patent application that is refiled. The second application is entitled to the benefit of the filing date of the first, and must be filed as a separate application before termination of proceedings on the prior application. Thus, after an applicant has received a final rejection, but before the examination proceedings have been terminated, an applicant can file a continuing application and start the examination process all over again. A continuing application is

appropriate where the original application contained patentable subject matter but did not clearly identify or distinguish it from prior inventions. This procedure, which can be continued almost indefinitely, does, however, involve the payment of additional fees by the applicant.

Continuation-in-Part

A continuation-in-part is an application filed during the lifetime of an earlier application by the same applicant, repeating some substantial portion or all of the earlier application and adding matter not disclosed in the earlier case. The continuation-in-part application is entitled to the benefit of the filing date of the earlier application as to the common subject matter. A continuation-in-part application is appropriate when a patentable improvement of the original invention is developed after the original application is filed.

Board of Appeals

After the claims in an application have been rejected twice, or after a final rejection has been received, an applicant may, upon the payment of a fee, appeal the decision of the Examiner to the Patent Office Board of Appeals. Such an appeal is appropriate when the applicant feels that the Examiner's rejection is clearly incorrect.

Federal Court

Any applicant dissatisfied with the decision of the Board of Patent Appeals may appeal to the United States Court of Appeals for the Federal Circuit. This is an unusual and expensive procedure that can only be justified for inventions having substantial commercial potential.

PRACTICAL CONSIDERATIONS

IDENTICAL INVENTIONS DEVELOPED BY TWO SEPARATE INVENTORS

An "interference" is a proceeding instituted in the Patent and Trademark Office when two or more inventors are claiming the same patentable invention. An interference may be declared between two or more pending applications naming different inventors and claiming the same patentable invention. It may also be declared between one or more pending applications and one or more unexpired patents. In the United States, the first party to invent, not the first party to file an application, is entitled to receive the patent for the invention. There is a presumption that inventions are made in the order of their respective filing dates. It is possible, however, for a person with a later filing date to show that he was the first party to invent.

Each party must submit evidence to the Patent Office to prove his actual date of invention. The Patent Office will then determine which party was the first to invent. In making this determination, the Patent Office will consider the following factors: the date on which each inventor mentally conceived the invention, whether the inventors were diligent in reducing their inventions to practice, and the date on which each inventor actually reduced the invention to practice.

ONE YEAR GRACE PERIOD

An inventor has a grace period of one year (in the United States) in which to file a patent application. During that one year period, he may place his invention in public use or on sale without losing his right to apply for U.S. patent protection.

CONFIDENTIALITY

Patent applications are kept in confidence by the Patent and Trademark Office. No information concerning the application will be given to anyone without the permission of the applicant except

in special limited circumstances. If the applicant decides at some point not to continue his attempt to obtain a patent, the contents of his application will forever be kept in confidence by the Patent Office. It is only when a patent is actually issued that the information contained in the application is made public.

EXPERIMENTAL USE

A patent will be denied if an invention was in public use or on sale more than one year prior to the date of application. However, there is an exception to this rule known as "experimental use." The "experimental use" exception permits some public use of the product by an inventor in order to enable him to perfect his invention before applying for a patent. The exception does not apply to situations where the use or sale of the device is mainly for profit and commercial purposes and the experimentation is merely incidental. For example, market acceptance testing is not considered to be an experimental use.

Any public experimentation should be no more extensive than reasonably necessary for the perfection of the invention. It is up to the Examiner to determine whether the scope and length of the experimental activity is reasonable in terms of the intended purpose of the tests and the nature of the subject matter involved.

PATENT PENDING

The words "patent pending" can be placed on an invention once the inventor has filed a patent application. After a patent issues, the patent number is generally placed on the invention.

In some ways, the words "patent pending" can be a more powerful deterrent to a competitor than the actual patent which later issues. When a competitor sees the words "patent pending" on a product, he has no idea what feature or features of the invention are being claimed in the pending patent application. Suppose for example, that the applicant places the words "patent pending" on a vacuum cleaner. The patent application may contain claims directed to a certain type of switch mechanism. However, a competitor would have no way of knowing this since

patent applications are kept in confidence by the Patent and Trademark Office. The competitor might think that the invention the applicant is claiming relates to the brush mechanism, the type of motor or the hose assembly, and therefore, avoid copying any of these features.

If a patent issues, however, the competitor will be able to obtain a copy of the patent almost immediately. He can then determine exactly what the inventor has claimed as his invention. Once he discovers that the patent applies only to the switch mechanism, for example, the competitor can freely copy the other features of the vacuum cleaner without worrying about possible infringement.

For this reason, there is some incentive to keep the patent application pending for as long as possible so that the words "patent pending" rather than "patented" may be displayed on the product. In addition, since competitors cannot inspect an applicant's patent application without permission, applicants sometimes permit others to see the application, but only after the payment of a fee to the applicant.

COST TO OBTAIN PATENT PROTECTION

The expenses associated with obtaining patent protection fall into two general categories: patent attorney fees and government fees, both of which are discussed below.

Patent Attorney Fees

Patent attorney fees include the cost of (i) drafting the patent application, (ii) completing the necessary formal documents, and (iii) drafting responses to the Examiner's Office Actions issued after the examination of the application is completed. The cost of drafting a patent application, including completion of the attendant documents, is highly dependent upon the complexity of the invention, but typically runs between about $2,000 to $4,000. The cost of drafting a response to an Examiner's Office Action depends upon the complexity of the Action but typically runs between about $500 and $1,500. The patent application may be allowed on the first Office Action which would, of course, eliminate the cost of drafting a response. Patent attorneys typically work on an hourly fee basis. Very few are willing to work for a fee contingent upon profits to be derived from the patented invention.

Further, patent attorneys typically require the prepayment of a substantial portion of the application costs.

Patent attorney fees can be eliminated completely if the applicant drafts and prosecutes the patent application himself. The Patent and Trademark Office does allow an applicant to file and prosecute his own patent application, and various publications are available to assist those wishing to file their own application.

Government Fees

Government fees include (i) a basic filing fee of $340, (ii) an issue fee of $560, and (iii) periodic maintenance fees which start at $400, and later escalate to $800 and $1,200. Government fees may be reduced by one-half if the applicant qualifies as a "small entity" which is defined as (i) an individual, (ii) a business with 500 or fewer full-time, part-time and temporary employees (weighted average), or (iii) a qualifying non-profit organization or institution. The basic filing fee is due and payable upon filing of the patent application. Several controllable factors such as the existence of more than 20 claims, the existence of more than 3 independent claims, the late filing of necessary attendant documents, etc., may increase the basic filing fee. The issue fee is due and payable when and if the Examiner allows the application. The maintenance fees are due and payable 3 1/2 years after issuance ($400), 7 1/2 years after issuance ($800), and 11 1/2 years after issuance ($1,200). Failure to pay any of the government fees when due can result in abandonment of the application and/or patent.

In summary, the total cost of filing and prosecuting a patent application typically runs between $4,000 to $10,000, and must be expended without any guarantee of success.

ENFORCEMENT OF PATENT RIGHTS

A patent entitles the patent owner to prevent others from making, using or selling the patented invention within the United States for the term of the patent. The patent owner has the sole right to make, use or sell the patented invention. While others may make the patented invention outside of the United States, they are not permitted to sell or use the patented invention within the United States. Similarly, others are not allowed to make the invention in

the United States for use or sale outside of the United States.

By bringing a court action against an infringer, the patent owner may seek both an injunction against the infringer as well as seek to recover monetary damages. If successful in such an action, the court may order the infringer to cease making, using or selling the patented invention as well as grant a monetary award to the patent owner. The scope of the injunction will be determined on a case by case basis. Similarly, the damages will be determined on a case by case basis and should be adequate to compensate the patent owner for the acts of infringement, but in no event should the damages be less than a reasonable royalty for the use made of the invention by the infringer.

An alternative to bringing an action against an infringer is to offer the infringer a license to make the patented invention. Such a license may include an up front fee as well as a royalty for each unit of the patented invention that the licensee would make, use or sell.

A patent may have method claims, apparatus or product claims, or a combination of all three. If the patent includes apparatus or product claims, other persons will be prevented from making, using or selling the specific product or apparatus. If method claims are granted, others will be prevented from using the same method, but would not be prevented from making the same end product by a different method.

The United States Patent and Trademark Office is responsible for examining and issuing patents to eligible inventors. For all practical purposes the role of the Patent Office ceases upon issuance of the patent. The Patent Office does not monitor commercial transactions for the presence of potential infringement, nor does it enforce patent rights against potential infringers once their presence is made known. It is the duty of the owners of the patent to protect their patent rights at their own expense.

The Patent Office does not guarantee the validity of a patent. A patent may be found by a court to be invalid and hence unenforceable at any time during its lifetime.

The financial cost of enforcing a patent against a potential infringer is highly dependent upon the complexity of the case, but legal

expenses alone can easily reach $20,000 and often reach hundreds of thousands of dollars. Very few attorneys are willing to litigate such cases for a fee contingent upon winning the case. It is of course possible to recoup part or all of the legal costs should the patentee win, but this prospect is never certain in advance of the court action.

It is possible to avoid the costs associated with litigation by arbitrating an infringement dispute, but arbitration requires both parties (i.e., the patentee and the potential infringer) to agree to arbitrate. Generally speaking, the chance of getting such an agreement is poor.

Patent protection offered by a valid United States patent extends only to the making, using and selling of the patented invention in the United States. A third party may make, use or sell the patented invention in any other country without infringing the U.S. patent. To obtain patent protection in foreign countries it is necessary to file a patent application in each of the countries where protection is desired. Each of these countries has its own set of rules and regulations which must be followed. Should the inventor contemplate obtaining foreign protection he should seek help from a patent attorney before disclosing, selling or attempting to sell the invention anywhere, including the United States.

TIME REQUIRED TO OBTAIN PATENT PROTECTION

On average, it takes between one to four years from the filing date of a patent application to obtain an issued patent. Some patent applications remain pending for decades. The applicant can control to some extent the speed with which the application is processed by filing a very complete application and responding quickly to the Examiner's Office Actions. The number of Office Actions issued will usually be limited to two, because the Examiner will denote the second Office Action as a final action. The applicant will then be required to either (i) prepare the application for issuance of any allowed subject matter, (ii) appeal the case to the Patent and Trademark Board of Appeals, or (iii) file a continuing application starting the examination and response process over again. At any time beginning with the first Office Action, the Examiner may find allowable subject matter and allow the application. The patentee may abandon the application at any time, even after allowance.

FINDING SOMEONE TO MANUFACTURE AND DISTRIBUTE YOUR INVENTION

Minnesota Statute 325A.04 requires invention marketing services which solicit businesses in Minnesota to disclose how many individuals who have come to that service for help have made money on the invention after contracting for the service. This number is usually quite small, such as 1 out of 500 or 1,000 people. If the service refuses to provide you with this information or such information seems to be too good to be true, be skeptical and demand proof of their claims.

The services typically offered by invention marketing services include patentability searches, patent application drafting and prosecution, direct mailings to businesses that might be interested in selling your invention, review of trade directories and census documents to determine the potential market for your invention, presenting a written description of your invention at trade shows, and furnishing their client with the names of potential manufacturers. Generally, patentability searches and patent applications prepared by the services tend to be of good quality. However, the value of the other services offered is questionable. It is strongly recommended that an inventor contemplating using such services carefully review what the inventor is getting for his money and the usefulness of the information and services received.

A better alternative to employing invention marketing services (and, in many cases, to immediately filing a patent application) is for the inventor to utilize the money that would have been spent on those services to directly contact and meet with potential marketers of the invention. In practice, this is the most successful strategy for independent inventors with limited financial resources.

A patent may bring economic benefit to the patent owner by the outright sale of the patent, licensing the patent to others, or by commercially exploiting the patented invention itself. In order for the independent inventor to attempt either the sale or licensing of the patent, he must first identify the potential buyers/licensees. Once a potential buyer is located, one must then place a value on the patent. If the product covered by the patent has not yet been commercially produced, it may be quite difficult to determine

accurately the value of the patent. Therefore, the patent owner may wish to license the patent and obtain a royalty on the future commercial exploitation of the patent. The specific terms of each individual license would have to be negotiated with the licensee. A typical license agreement might include a lump sum payment to be made immediately upon the licensing of the patent as well as a royalty to be paid for each patented product produced. In addition, a license may either be exclusive or nonexclusive. If a license is exclusive, the licensee will have the sole right to make, use or sell the patented invention. If the license is nonexclusive, the patent owner may license several different licensees. The length of the license can be for any term agreeable between the parties, but often is for the life of the patent but cannot legally exceed the life of the patent.

SUMMARY

A patent, as previously indicated, gives one the exclusive right to prevent others from making, using or selling the patented invention. In essence, it is a government created monopoly that allows only the patent owner to make, use or sell the patented invention.

The life of a utility patent is for 17 years. The patent owner would then be the first and only person in the marketplace selling the patented invention. Others would not be able to begin making, using or selling the patented invention until after the 17 year period expired. As such, the patent owner would have 17 years to establish a market share as the sole supplier of the patented invention.

TRADEMARK PROTECTION

A trademark is a word, name, symbol or device used by a manufacturer or merchant to identify his goods and distinguish them from others. A service mark is a word, name, symbol or device used by one offering a service in order to identify his service and distinguish it from others. Service marks are also sometimes referred to as trade names. For purposes of the following discussion, the word "trademark" will be used to refer to trademarks, service marks, and trade names.

Federal or state registration does not create a trademark. Trademark rights can only be acquired by actually using the trademark in association with particular goods or services. Although a trademark may be registered, such registration cannot be obtained until the mark is actually in use and registration, once obtained, cannot preserve rights in the trademark if use is discontinued or improper.

For most practical purposes, state registration of a trademark is meaningless. Since this area of law is controlled primarily by federal statute (the Lanham Act), existing state laws do not provide comprehensive trademark protection, if they provide any protection at all. Federal registration of a trademark, on the other hand, gives the registrant substantial procedural advantages if the trademark owner should ever be faced with the task of stopping a potential infringer. Federal registration of a trademark typically costs approximately $500 if the services of an attorney are used. An individual may apply for federal trademark registration directly to the United States Patent and Trademark Office without using an attorney.

In order to obtain federal registration of a trademark, or to have any rights in the mark at all, the mark must first be used in commerce, and use of the mark must be substantially continuous if rights in the mark are to be preserved, even after registration is obtained. Federal registration cannot be obtained until the trademark has actually been used on the goods and services in interstate commerce. If a trademark is used in association with goods, its proper use requires that it be placed on the goods directly, or their

containers, or displays associated with the goods, or tags or labels that are affixed to the goods. If the mark is used in association with services, the mark must be used or displayed in association with the sale or advertising of the service.

As long as a trademark is being used properly, the trademark rights will last indefinitely, and any federal registration of the trademark may be renewed indefinitely. Proper use of a trademark requires that it always be used as an adjective, and never as a noun. For example, the word "zipper" was once a registered trademark and denoted a particular type of fastener. Proper use of that trademark would have been to always refer to the fastener as the "zipper fastener" and never simply as "a zipper." Since this trademark was used improperly as a noun referring to the fastener itself, the word "zipper" lost its trademark status and simply became the "generic" word identifying a product, thereby giving anyone the right to use the word "zipper."

Once a trademark has been federally registered, it should be identified either with the words "registered" or with the symbol ® . An unregistered trademark should be identified with the letters ™ placed in close association with the word or symbol which comprises a trademark.

TRADEMARK SELECTION

The selection of a trademark can be very important in terms of the trademark owner's ability to obtain registration and prevent others from using the mark. Trademarks can generally be classified into four basic categories: (i) generic, (ii) descriptive, (iii) suggestive, and (iv) arbitrary.

A generic trademark is really not a trademark at all. A generic trademark is like the word "zipper," discussed earlier, which has lost its trademark significance and has come to be used by everyone speaking the English language to describe not the brand of a product, but rather the whole class of products. Thus, when choosing a trademark, it would be improper to choose a word which is defined in a dictionary to mean the type of product on which the trademark is used. In other words, if you develop a type of motor vehicle, don't choose a trademark such as "car" or "automobile" and expect to be able to prevent others from using your "trademark."

Descriptive trademarks are also usually poor choices if you intend to be able to prevent others from using an identical trademark. A mark is descriptive if it simply tells the public what the product is. For example, if your product is a telephone which may be used in an automobile, the trademark "car phone" would be considered descriptive, since it merely describes what you are selling. Similarly, a trademark such as "Minnesota mineral water" would be considered geographically descriptive, since any product coming from the state of Minnesota may be identified with the prefix Minnesota. There is generally no way that a person could prevent others who make a similar product in Minnesota from so identifying their products.

This is not to say that either generic or descriptive words cannot be used as trademarks, but rather, no exclusive trademark rights will be created. If one merely wishes to describe what it is they are selling, and is not particularly interested in uniquely identifying themselves as the source of that product, the generic and descriptive trademarks would be perfectly acceptable.

Suggestive trademarks are stronger trademarks, especially if they hint at some quality of the product without actually telling exactly what the product is. For example, the trademark "hercules" might be a suitable trademark for a variety of goods since it conveys or suggests an image of durability and strength, but does not indicate what the product is that is being offered.

Arbitrary or fanciful trademarks are the best choice. These are words that have absolutely no meaning in the English language prior to their adoption by a particular manufacturer for use with their goods or services. These marks instantly become identified with the particular manufacturer and the exclusive right to use the mark is easily asserted against potential infringers. Examples of arbitrary or fanciful trademarks include "KODAK® " for cameras and "XEROX® " for photocopiers.

The entire purpose of a trademark is to serve as a unique indicator of the origin of a product or service. Thus, members of the public will come to associate a particular trademark with a particular manufacturer of a product and will ask for the product by that particular name, thus giving the trademark great commercial importance. Therefore, when choosing a trademark, one should try to select a name that will lend itself to the task of serving as a

unique identifier of a particular manufacturer in a competitive marketplace.

Another point which is important in considering the trademark is the concept of "secondary meaning." The term "secondary meaning" simply means that a trademark is made up of a word that might be interpreted as merely descriptive, but because it has been used as a trademark for such a long time by a particular manufacturer, the public has come to associate that particular mark with the manufacturer in spite of its descriptive quality. An example of such a mark would be "Kentucky Fried Chicken® " which has come to signify chicken from a certain franchising organization, rather than as descriptive of all fried chicken originating in Kentucky. Since this particular trademark has acquired "secondary meaning" through use in the marketplace, other distributors of fried chicken, even if they are actually located in Kentucky, may not use this trademark which is, at first glance, merely a descriptive phrase.

THE FEDERAL TRADEMARK REGISTRATION PROCESS

The registration of a trademark is not a mere formality. The applicant must first have used the trademark in association with goods or services in interstate commerce. An application can then be filed with the United States Patent and Trademark Office by enclosing the required fee, five examples of the tags, labels or packaging which bears the trademark, and various required statements outlining when the mark was first used and the types of goods and services on which the mark is used.

Trademarks are categorized for registration purposes into several different classes, such as, for example, cosmetics, toys, or clothing. If a trademark is to be registered in more than one class, that is, it is used on both toys and clothing, then a separate registration fee ($175) must be paid for each class in which registration is sought.

Once the application is filed, the application is examined by Trademark Office personnel referred to as Trademark Attorneys. The examination process is designed to determine if any other trademark is federally registered for similar goods and services which may be "confusingly similar" to the trademark seeking

registration. One must keep in mind that trademark infringement may occur even if an identical mark is not being used. The legal standard states that a trademark is infringing if it is "confusingly similar" to an existing trademark used on similar goods and services, and so the Trademark Office bases all of its examinations on this particular standard.

If a Trademark Attorney determines that the trademark is not confusingly similar to an already registered mark, the mark is "published" in an official government magazine called the **Official Gazette.** This official publication gives members of the public an opportunity to "oppose" the registration of the mark if they feel that it is confusingly similar to some trademark that they are using, even if their mark is not already federally registered. After a waiting period of thirty days has elapsed, the trademark is granted federal registration, but may still be cancelled at a later time if it is not used properly or if a prior user of the mark discovers only after the registration is granted that someone else is using its trademark.

The important point to remember in selecting and using a trademark is that the adoption of a new trademark can entail a substantial expenditure of money. Therefore, prior to using a mark, it is usually a good idea to perform a "trademark search" to determine if a similar mark is being used anywhere in the country. Various organizations are available which can perform a professional trademark search, the cost typically being between $200 and $300. If the results of the trademark search are positive, use of the mark should begin immediately, including interstate use, so that the trademark can be registered federally.

TRADEMARK INFRINGEMENT

A trademark can be infringed even if the infringer is not using an identical mark. Trademark infringement occurs when another trademark is confusingly similar to the original trademark. Whether the two trademarks are confusingly similar depends on a number of factors, including:

- The existence of actual confusion in the marketplace between the two marks;
- Similarity of the appearance, sound and meaning of the marks;

- Similarity of the goods and services being identified by the two trademarks;
- The degree of secondary meaning acquired by the trademarks;
- The sophistication of the consumers who buy the particular products or services;
- The similarity of the channels of distribution of the products or services (that is, are they both sold in the same types of stores);
- The degree of commercial competition between the two trademark users; and
- The distinctiveness of the trademarks (that is, are they somewhat descriptive or arbitrary and fanciful).

Since trademark rights are created by use of the trademark, one's rights in the trademark prior to federal registration are limited to those areas of the country where the mark has actually been used. Thus, in the absence of federal registration, it is perfectly permissible for two organizations to use identical marks on identical goods if each of them occupies geographic market areas that are widely separated.

As with patents, the United States Patent and Trademark Office has no program for monitoring for the potential infringement of registered marks, and will not enforce trademark rights on behalf of the owner of a federally registered trademark. Once a trademark owner determines that someone else is potentially infringing his trademark, the trademark owner must bear the expense of remedying the situation. Frequently, a simple letter to the infringer requesting that they cease use of the mark is sufficient. However, if the infringing party is not cooperative, the controvery is likely to end up in a federal court with all of its attendent legal expense. The commercial value of the trademark must necessarily be fairly substantial to justify the expense involved in conducting a full scale trademark infringement suit in federal court. Again, it must be emphasized that a descriptive trademark, even one having substantial secondary meaning, is much more likely to be successfully infringed than arbitrary or fanciful trademarks. Also, an arbitrary or

fanciful trademark is likely to be much less expensive to defend in any legal battle, since its ownership will be more readily apparent to a court deciding the issue of infringement.

SUMMARY

As the owner of a trademark, the owner may prevent others from using a mark which is confusingly similar to the owner's mark. To determine whether or not another mark is confusingly similar, it is necessary to look at the sound, appearance and meaning of the trademark as well as the goods/services for which the mark is used. A trademark can be quite valuable in that it identifies the product/services carrying the mark as originating from a certain source. The public will begin to recognize a trademark as standing for a certain level of quality and may very well build an allegiance towards purchasing those products/services in the future.

In addition to preventing others from using a confusingly similar mark within the United States, the owner of a registered trademark may also utilize the United States Customs Service for preventing products bearing confusingly similar trademarks from being imported into the United States.

COPYRIGHT PROTECTION

A third type of intellectual property is the copyright. Copyrights protect literary and artistic "expressions" as well as other types of informative media that derive their usefulness from the particular

manner in which the information is expressed. Books, musical works, plays, computer programs, paintings, sculptures and movies are among the types of works which are eligible for copyright protection. Generally, any work which includes an artistic or expressive component can be the subject of a copyright.

A copyright generally protects only a work's appearance or "expression." Copyrights are different and separate from patents and trademarks. You cannot copyright an invention; you patent an invention. You cannot copyright the name of a product; but you can establish trademark rights in a product name. You cannot patent or trademark a book; a book, which is the particular expression of an idea, is protected only by copyright.

A copyright arises in a work if at least a portion of the work is original (not copied from something else) and the work includes some literary or artistic expression. Copyright only protects particular expressions of ideas, not the ideas themselves. For example, although a copyright exists in a particular painting of a lighthouse, the copyright only protects that particular painting and does not prevent others from painting the lighthouse. Painting the lighthouse is the "idea" and is not protectable; the particular painting of the lighthouse is an "expression" of the idea, and is protectable.

A copyright automatically comes into being when the work is written down or otherwise fixed or recorded. There is no need to sell a copy of the work (as in the case of trademarks). Nor is it necessary that the work be registered with the federal government (as in the case of patents).

In order to best preserve the copyright in a work, all publicly distributed copies of the work should have a copyright notice affixed to them. The notice should include the familiar © symbol (or the word "copyright" or "copr."), the year of first publication and the name of the owner of the copyright. Thus, a sufficient copyright notice might be: © 1986 Norman Smith.

Within three months after publication, two copies of the best edition of a work should be deposited in the Copyright Office.

In addition, the copyright in a work can be registered with the Federal Government at any point during the life of the copyright.

One copy (if the work is unpublished) or two copies (if the work is published) of the work, along with a completed registration form and a $10 fee are submitted to the Copyright Office. Typically, the Copyright Office will process the registration within a few months after receiving the application. The copy or copies which are submitted with the registration application fulfill the deposit requirement mentioned above.

Although failure to register will not invalidate a copyright, registration is highly recommended for a variety of reasons, not the least of which is that registration (or at least filing an application) is necessary prior to suing for copyright infringement. Registration is inexpensive ($10.00) and may be easily performed by the individual without consulting an attorney.

The owner of a copyrighted work has the exclusive right to do and to authorize any of the following:

- Copying of the work;
- Adaptation of the work (e.g., making a movie based on a copyrighted book);
- Distribution of copies of the work to the public, by sale, rental or otherwise;
- Public performance of the work; and
- Public display of the work.

There are many limitations to the exclusive rights listed above. Two of the most common are the "fair use" and "first sale" limitations. Also, in contrast to a trademark, a copyright only has a limited lifetime.

FAIR USE

Other people can use (copy, perform, display, etc.) a copyrighted work for purposes such as criticism, comment, news reporting, teaching, scholarship, or research without infringing the copyright. Fair use is determined on a case-by-case basis. Whether a use is indeed a "fair use" depends largely on the effect of the use upon the potential market for or value of the copyrighted work.

FIRST SALE

The owner of a lawful copy of a copyrighted work can sell, rent or otherwise dispose of that copy. This allows video rental shops to rent video tapes and permits the lawful rental of computer software.

DURATION

Generally, a copyright lasts for the author's lifetime plus 50 years. Thus, a copyright lasts considerably longer than a patent (17 year life for a utility patent) but not as long as a trademark, which can theoretically last forever.

SUMMARY

According to statute, the owner of a copyright has the exclusive right to do any of the following:

- To reproduce the copyrighted work in copies or in phonorecords;
- To prepare derivative works based upon the copyrighted work;
- To distribute copies or phonorecords of the copyrighted work to the public by sale or transfer of ownership, or by rental, lease, or lending;
- In the case of literary, musical, dramatic, and choreographic works, pantomimes, motion pictures and other audio visual works, to perform the copyrighted work publicly; and
- In the case of literary, musical, dramatic, and choreographic works, pantomimes, pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audio visual work, to display the copyrighted work publicly.

There are several limitations, such as those mentioned previously, that may be placed on the above noted rights.

Anyone who violates any of the exclusive rights of the copyright owner is an infringer. Remedies for infringement include injunctions, impounding and disposition of infringing articles, damages and profits, costs and attorneys fees. Further, importation of infringing copies may be prevented.

TRADE SECRET PROTECTION

A trade secret is any formula, pattern, device, process, tool, mechanism, or compound of peculiar value to its owner (and his employees) which is not protected by a patent and is not known or accessible to others. Trade secret protection is governed exclusively by state law, but for all practical purposes, every state makes a theft or unauthorized dissemination of a trade secret an unlawful act.

One of the major benefits of a trade secret is that there is no limitation as to length of time that the trade secret may be kept confidential. With a patent, the patent owner only has exclusive rights for seventeen years. Similarly, there may be problems with policing one's patent rights. With a trade secret, as long as it is kept confidential, it will benefit only the owner of the trade secret. One good example of a trade secret is the formula for Coke-A-Cola® .

The courts will protect trade secrets if they are truly secret, substantial and valuable. This type of protection is appropriate only for products or processes that cannot be discovered by any sort of "reverse engineering." In other words, the secret must still be un-

discoverable even after the product is placed in the hands of the ultimate consumer and subjected to a thorough analysis.

COMMONLY ASKED QUESTIONS CONCERNING INTELLECTUAL PROPERTY PROTECTION

1. **What is the difference between a design patent and a utility patent?**

   A utility patent covers the concept or idea behind a device or process, whereas a design patent protects only the appearance of the article. The utility patent has a term of 17 years, and a design patent is good for 14 years. A design patent application consists primarily of a drawing, whereas a utility patent application includes drawings accompanied by a detailed text and carefully written claims.

2. **What are the three requirements for patentability?**

   The invention must be new, useful and nonobvious. Most patent applications are rejected on the ground that the invention would have been obvious to an imaginary person skilled in that particular area of technology who is aware of all printed material and patents that have ever been published relating to that particular field.

3. **If I develop a new idea, must I apply for a patent before I begin selling my product?**

No. Although sales or other public disclosures of your invention prior to filing a U.S. patent can cause the loss of foreign patent rights, it will not affect your U.S. patent rights if you file an application within a year of your first offer for sale or other public disclosure.

4. How long does it take to get a patent after I apply?

Although some patents issue within a few months, a typical patent takes between 1 and 4 years to issue, assuming it is ever granted. Some patent applications remain pending for decades.

5. Can I apply for a patent without going through an attorney?

Yes. Several publications exist to assist inventors in filing their own application including "The Inventor's Notebook" by Fred Grissom and David Pressman and "Patent It Yourself" by David Pressman. (Nolo Press Books, Berkeley, CA 94710.)

6. Is it possible to obtain a patent for an improvement made on a device or process which has already been patented?

Yes. The issues of patentability and infringement are entirely separate. Therefore, one may obtain patent protection for an improvement to a device, yet, in order to build the improvement and market it in conjunction with the original device would infringe the original patent.

7. If I find out that someone is infringing my patent, what will the Patent Office do to protect my rights?

Nothing. The Patent Office plays no role in discovering or prosecuting infringers of valid U.S. patents. The patent owner is entirely responsible for bearing the burden and expense of protecting his patent rights.

8. If two people invent the same thing independently, does the first person to file a patent application receive the patent?

Not necessarily. If two applications are filed claiming the

same subject matter, the Patent Office begins a special proceeding, known as an "interference," in order to determine who was the first actual inventor. Factors considered by the Patent Office in determining who receives the patent include (i) the first to conceive of the invention; (ii) the diligence with which each inventor attempted to reduce his idea to practice; and (iii) who was the first inventor to actually reduce his invention to practice.

9. **Do most people who receive patents end up making money off of them?**

No. A patent is issued for any idea that is new, useful, and nonobvious. The issuance of a patent is not an indication that there is any reasonable commercial use for the invention.

10. **If I develop a new product and begin selling it without applying for a patent, can't someone else obtain a patent on the idea and prevent me from making my own product?**

No. Only the true inventor may apply for a patent.

11. **Can more than one person be named as the inventor in a patent?**

Yes. Multiple inventors are quite common, and indeed, it is a legal requirement that all contributors to the inventive concept claimed in the patent be named as inventors.

12. **If one of my employees invents something in the course of his duties, can I apply for the patent?**

No. Only the true inventor can apply for a patent. However, if the employee develops his invention as part of his job duties, he has a legal duty to assign his entire right in the invention to his employer.

13. **If I develop a new, useful and nonobvious method of making something that is already known, can I obtain a patent on the method only?**

Yes. Method or process patents are quite common, especially

in the fields of chemistry, materials and data processing.

14. If I have a United States patent on some particular apparatus or device, can I prevent someone abroad from making the device and exporting it for sale in the United States?

Your United States patent will not permit you to prevent someone from manufacturing or using your device abroad, but will prevent the device from being sold or used in the United States, regardless of where it is manufactured.

15. How can I obtain trademark protection without registering the trademark?

By using the trademark in association with the relevant goods or services. Trademark rights can only be created by use, and registration of the mark can only take place after actual use of the mark has occurred.

16. How can I reserve a trademark that I intend to use in the future but have not yet actually begun using?

It cannot be done. There is no mechanism for reserving a trademark because trademark rights can only originate when use of the mark in commerce is initiated.

17. If I reserve a corporate name with the Secretary of State, doesn't that give me trademark rights in that name?

No. A corporate name can never take on trademark status until that name is used in association with specific goods and services.

18. If I am using a trademark that is not identical to someone else's trademark, can I still be guilty of trademark infringement?

Yes. Trademark infringement occurs whenever two trademarks exist in the same market which are "confusingly similar" to each other. Thus, if the two trademarks are similar enough to confuse the average member of the public as to the origin of the products or services, trademark

infringement has probably occurred.

19. If I obtain a state trademark registration, does that registration guarantee that I have exclusive rights to use the trademark in that state?

No. State trademark laws vary from one state to another, but generally only a cursory examination is performed to determine if your mark is similar to other marks registered in that state. Some states perform no examination whatsoever, and it is quite possible to obtain a state trademark registration for a trademark that is identical to an already existing federally registered trademark. In such a case, a state trademark registration is of little or no value.

20. After I create some literary or artistic work, what do I have to do to obtain a copyright on my creation?

Nothing. Copyright protection comes into being at the moment the work is created. In order to preserve your copyright, you should mark it with a copyright notice, which includes the word "copyright" or ©, the year of creation, and your name. Therefore, an appropriate copyright notice could look like: © 1986 William Smith.

21. Why would I want to register a copyright if copyright protection comes into being automatically when I create the work?

Registering a copyright offers procedural advantages if you should ever attempt to prevent the unauthorized copying of your work. Copyright registration may be accomplished by filling out a form available from the Library of Congress and submitting it along with appropriate specimens and fees (usually $10).

22. If I manufacture a product by a secret process and one of my customers discovers that process by analyzing the product, can I recover damages for the theft of my trade secret?

No. A trade secret loses its status as a secret if it can be discovered by members of the public by inspection and analysis of the product. No action may be taken against anyone discovering the trade secret by such methods.

23. What is the address and telephone number for the Copyright Office?

Copyright Office
Library of Congress
101 Independence Avenue, Room 40
Washington, D.C. 20559
(202) 479-0700

24. What is the address and telephone number for the U.S. Patent and Trademark Office?

Mailing address:

U.S. Patent and Trademark Office
Washington, D.C. 20231

Physical location:

U.S. Patent and Trademark Office
2011 Jefferson Davis Highway
Crystal Plaza Building #2
Arlington, Virginia 22202
(703) 557-3158